

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: 'I-1', NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 1254/Del/2015  
ASSESSMENT YEAR. 2010-11**

M/s Degania Medical Devices Pvt. Ltd., Plot No.251, Sector-6, IMT Manesar, Gurgaon.  PAN: AACCD0262A	<b>vs.</b>	Dy.CIT Circle -1(1) Gurgaon.
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	Sh. Rohit Tiwari, Advocate Sh. Shobhit Tiwari, Advocate
<b>Department by</b>	Sh. Sanjay I Bara, CIT, D.R.
<b>Date of Hearing</b>	13.06.2018
<b>Date of Pronouncement</b>	27.06.2018

**ORDER**

**PER K.NARASIMHA CHARY, JM**

This is an appeal preferred by the assessee challenging the order of by the Deputy Commissioner of Income-tax, Circle 1(1), Gurgaon ( for short 'Id. AO") dated 12.01.2015 passed pursuant to the directions given by the Dispute Resolution Panel –II, New Delhi vide directions dated 16.12.2014.

2. Brief facts of the case are that assessee is a private limited company, which is engaged in the business of import of assembly of component and re-export of assembled medical disposable balloon catheters as 100 % export oriented unit ( EOU). It is providing a captive production to its parent company

and its parent company has helped in setting up and expansion of manufacturing facilities by providing technology, training, and finance administrative and marketing support to the assessee. Assessee imports different sub assemble parts i.e. semi finished balloon catheters which includes the purging of holes in the silicon tubing and fixing with wall, rings and the balloon. The final products are being sold only to one customer i.e. the AF of the assessee.

3. For the Assessment Year 2010-11, the assessee filed the return of income on 20.0.2010 declaring nil income and during the scrutiny, learned AO found that during the financial year 2009-10, the assessee entered the following international transactions with the AE:

S.No.	Nature of international transactions	Value (in INR)	Method used
1	Sale of Finished goods	24,36,64,599	TNMM
2	Purchase of Raw material	16,94,63,209	TNMM
3	Purchase of Plant and machinery	45,54,101	CPM
4	Interest	14,84,727	CUP

4. According to the report of the TPO, the assessee adopted TNMM as MAM and OP/OC as PLI for benchmarking its transactions of purchase of raw material and sale of finished goods. The assessee worked out margin of 8.32% in case of comparables as against 5.66% in its own case.

5. Ld. TPO, however, rejected the economic analysis of the assessee and worked out margin of 9.648% in case of comparables selected by him, re-computed the margin of the assessee at (-)1.0548% after treating forex gain as non-operating including the Hindustan Syringes & Medical Devices P. Ltd. as comparable company, not allowing the risk adjustments and the working capital adjustments thereby proposing adjustment of Rs.2,63,78,207/- vide his

order dated 21.1.2014. The AO incorporated this addition in his draft order dated 21.3.2014.

6. When the assessee filed objections before the learned DRP, learned DRP refused to interfere with the findings of the TPO and confirmed the same. Hence, the assessee filed this appeal by on as many as 10 grounds. Ground Nos. 1,2 & 10 are general in nature whereas ground Nos.4,5,& 7 are not pressed by the assessee at the time of the argument. Therefore, what effectively remains for adjudication are ground nos. 3 relating to the treatment of the foreign exchange gains as non operating; ground no.6 relates to transfer pricing issue; ground No.8 challenges the non allowance of risk adjustment and ground No.9 not allowing the working capital adjustments.

7. First coming to the issue relating to the foreign exchange gain, learned TPO considered the foreign exchange gain or loss as non operating in nature basing on the definitions given in Safe Harbour Rules for calculating PLI, operating revenue, cost and operating margins. Learned DRP is also of the same opinion that the foreign exchange gain or loss is non-operating in nature.

8. It is the argument of the learned AR that the safe harbour rules are applicable only from Asstt. Year 2014-15, that too in specific cases. He submits that it has no retrospective effect, and from Asstt. Year 2007-08 till 2009-10, foreign exchange gain or loss is treated as operating gain or loss. As a matter of fact, the learned TPO had followed the same for the Asstt. Year 2009-10. Learned AR relied upon Rule 10TA where it says that such a definition is purpose of the Rule 10TA and Rule 10B to 10G only, and it is not a definition of operational gain or loss for the purpose of income-tax rules as a whole.

9. Further, it is brought to our notice that in assessee's own case in ITA No.895/Del/2014 by order dated 7.11.2016, a coordinate Bench of this Tribunal held that the foreign exchange fluctuations in this matter are on revenue account and the hedging is also a risk mitigating exercise to reduce the cost of imports only. As such, it should be considered as part of the operating profits and losses of the company. Further, reliance is placed on the decision reported in the case of PCIT vs B C Management Pvt Ltd. (2018) , 403 ITR 45 and PCIT vs Ameriprise India (P) Ltd. (ITA No.206 of 2016 dated 23.3.2016).

10. In assessee's own case for the immediately preceding assessment year, a coordinate bench of this Tribunal in ITA No.895/Del/2014 held as follows:

*“With respect to the foreign exchange fluctuations He submitted that these have been considered as nonoperational items. However, the assessee has considered the foreign exchange loss of Rs. 1953939/- as operational as the issue is those foreign exchanges fluctuations have arisen and because of the adjustment on account of sale or realization of the debts. He further submitted that if the same is excluded from the PLI working of the assessee and considered it as a nonoperational then the margin of the company also increases substantially to 1.20169%. In any way he submitted that this is an operational expenditure and therefore in case of the comparable companies also, it should be included while working out the PLI or it should be excluded in the case of the assessee. With respect to the foreign exchange fluctuation, which is on account of the forward contract with respect to the purchase of material? We fully agree with the contention of the Ld. authorized representative that these are the foreign exchange fluctuations on revenue account and the hedging is also a risk mitigating exercise to reduce the cost of imports and only. Therefore, it should be considered as part of the operating profits and losses of the companies.”*

11. In PCIT vs B C Management Pvt Ltd. (2018) (supra), the Hon'ble jurisdictional High Court held as follows:

*“7. In Principal Commissioner of Income Tax Vs. Ameriprise India Private Limited (ITA 206/2016) decided on 23.03.2016, this Court had held that foreign exchange gains earned by the assessee which is in relation to*

*trading items and emanating from international transactions, direct value derived from it cannot be treated as Non- Operating losses and gains.*

*8. This Court notices that Revenue seeks to rely on the Safe Harbour Rules which were notified by the Revenue authority and came into force in 2013. In these circumstances, given that the present assessment period covers AY 2011-12, the treatment cannot be in accordance with those rules as held in 'Principal Commissioner of Income Tax Vs. M/s Cashedge India Pvt. Ltd., ITA 279/2016', decided on 04.05.2016. Consequently, no question of law arises."*

12. We, therefore, in view of this established legal position, hold that the foreign exchange or loss is operative in nature and this ground is answered in favour of the assessee. Ground No.3 is accordingly allowed.

13. Now coming to transfer pricing issue, the assessee is challenging the selection of Hindustan Syringes & Medical Devices Pvt. Ltd. as a comparable to the assessee to benchmark the international transaction. It is submitted by the learned AR that Hindustan Syringes & Medical Devices Pvt. Ltd. is having a turnover of Rs.365.15 crores, net of excise turnover is Rs.352.86 crores whereas the assessee's turnover is only Rs.24.37 crores. He further submits that the turnover of the assessee constitutes around 6.5% of the turnover of the Hindustan Syringes & Medical Devices Pvt. Ltd and also that Hindustan Syringes & Medical Devices Pvt. Ltd produces entirely a different product and it is not a comparable company.

14. Learned AR further brought to our notice that in assessee's own case for AY 2009-10 in ITA No.895/Del/2014, this company is rejected. Learned DR does not dispute this factual position submitted by the learned AR.

15. Vide para 19 in ITA No.895/Del/2014, a coordinate bench of this Tribunal concluded that having found that Hindustan Syringes & Medical Devices Pvt. Ltd is functional dissimilarity with the assessee, it is not open for the learned

DRP to include this company for the comparable. It is further observed that there is a vast difference in the activities of these two companies. Hindustan Syringes & Medical Devices Pvt. Ltd has been using intangible assets for which royalty is paid whereas the assessee is merely a job worker. It is further found that Hindustan Syringes & Medical Devices Pvt. Ltd. is engaged in trading activities without any segmental accounts for different activities whereas the assessee is only an assembler.

16. Having regard to the factors well brought out in the order in ITA No.895/Del/2014 in assessee's own case, we are of the considered opinion that there are no reasons brought to our notice to take a different view. We accordingly held that Hindustan Syringes & Medical Devices Pvt. Ltd. is not a suitable comparable. We, therefore, direct the learned TPO to exclude this company from the final list of the comparables and to recompute the arm's length price for the international transaction. Ground no.6 is answered accordingly.

17. Ground No.8 relates to risk adjustment. Learned TPO held that the risk adjustment as a general rule cannot be allowed unless it is clearly shown that the comparables had actually undertaken such risk and how the same material affected the margins. Learned DRP held that the adjustment had functional difference, if any, can be made only if that difference can be ascertained accurately and their impact on the margins can be assessed with reasonable accuracy. It is further found that in the absence of any information, the quantification of the adjustment is not payable.

18. It is the argument of the learned AR that the finding of the exactly same company is not possible and keeping in view the difference, if any, adjustment should be made while computing the margin and bringing the assessee and the

comparable on the same lengths. He also brought to our notice that in assessee's own case for AY 2009-10, the contention of the assessee was rejected by a coordinate bench of this Tribunal observing that though the assessee stated that the comparable company had also taken a risk whereas the assessee is a risk free entity, no risk adjustment working was submitted before the Bench. On this score, the Bench refused to entertain that ground relating to risk adjustment.

19. Having gone through the entire record, we are also of the considered opinion that unless the adjustment on account of risk is quantified and working is given, it is not possible to direct the authorities below to allow the risk adjustment as pleaded by the assessee. We, therefore, are of the considered opinion that it is not possible for us either to consider at the Tribunal level or to direct the AO to consider this aspect. Hence, Ground No.8 of the appeal is dismissed.

20. Now coming to Ground No.9 which relates to the working capital adjustment, learned TPO observed that the assessee had not demonstrated as to how its working capital could be compared with the working capital of the comparables. According to the learned TPO, the assessee is receiving payment in advance. Assessee is working on a cost plus mark up basis and as per the agreement, it has to be reimbursed 4 to 6% mark up on total cost. The assessee was not reimbursed on cost plus mark up. Since the average OP/OC of the comparables is at 9.64%, within the range of mark up of 4 to 6%, which the assessee was supposed to get from the AE, working capital adjustment is not a significant issue in this matter.

21. Learned DRP observed that it is only when the hose different and the impact can be ascertained accurately then it is only possible to grant working capital adjustment.

22. It is argued before us by the learned AR that there are three critical elements in capital policy of the firm, viz., (a) lags between the time products are sold and payments on these sales are received, which create account receivable; (b) lags between the time inputs are purchased and payments on these purchases become due, which create accounts payable; and (c) lags in the physical process of production and sales, which create inventories. By allowing the customers to defer payment for a certain period, any company foregoes the right to receive its revenues immediately and to earn additional income by re-investing these revenues over the deferral period. The time allowed for the receivables differs from company to company. He further submitted that the assessee has negative working capital investment and it is saving on the cost of working capital. Accordingly, it would tend to work at lesser margin as compared to the independent comparables. Learned AR further brought to our notice that in assessee's own case for AY 2009-10 in ITA No.895/Del/14, a coordinate bench of this Tribunal accepted the contentions of the assessee and directed the learned AO to compute working capital adjustments only on the opening and closing balance of the working capital employed at the beginning and the end of the year.

23. We have gone through the order dated 7.11.2017 and vide para 25, a coordinate bench of this Tribunal accepted the plea of the assessee and directed the AO to compute the working capital adjustment on the opening and closing balance of the working capital employs at the beginning and end of the year. Facts being similar, while respectfully following the same, we

remand this ground to the file of the AO for computing the working capital adjustment only on the opening and closing balance of the working capital employed at the beginning and end of the year. Ground no. 9 is answered accordingly.

24. In the result, appeal of the assessee is allowed in part for statistical purposes.

Order pronounced in the Open Court on 27<sup>th</sup> June, 2018.

**Sd/-**  
**(PRASHANT MAHARISHI)**  
**ACCOUNTANT MEMBER**

**sd/-**  
**(K.NARASIMHA CHARY)**  
**JUDICIAL MEMBER**

Dated 27<sup>th</sup> June, 2018

VJ

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By Order

Assistant Registrar  
ITAT Delhi Benches

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